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OCTOBER TERM, 1979

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No. 79-1246

JOHN L. CONNOLLY, C. V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MIER, WILLIAM C. WAGGONER, RICHARD GANNON and ALFRED HARRISON, each in his respective capacity as Trustee of the Operating Engineers Pension Trust,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

and

PENSION BENEFIT GUARANTY CORPORATION, a nonprofit corporation established within the Department of Labor of the United States of America,
Real Party.

Brief Amici Curiae on Behalf of the Boards of Trustees of the Carpenters Pension Trust Fund for Northern California, the Cement Masons Pension Trust Fund for Northern California, the Laborers Pension Trust Fund for Northern California, and the Pension Trust Fund for Operating Engineers in Support of Position of Petitioners

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PENSION BENEFIT GUARANTY CORPORATION, a nonprofit corporation established within the Department of Labor of the United States of America,
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Brief Amici Curiae on Behalf of the Boards of Trustees of the Carpenters Pension Trust Fund for Northern California, the Cement Masons Pension Trust Fund for Northern California, the Laborers Pension Trust Fund for Northern California, and the Pension Trust Fund for Operating Engineers in Support of Position of Petitioners

This brief as *amici curiae* is submitted on behalf of the Boards of Trustees of the Carpenters Pension Trust Fund for Northern California, the Cement Masons Pension Trust Fund for Northern California, the Laborers Pension Trust Fund for Northern California and the Pension Trust Fund for Operating Engineers (herein the "Northern California Funds") with the written consent of the Petitioners and the Real Party. The written consents have been filed in the Office of the Clerk.

NATURE OF THE INTEREST OF THE NORTHERN CALIFORNIA FUNDS IN THE PROCEEDING

Each of the Northern California Funds is a joint labor-management trust established by collective bargaining between employers and unions in the building and construction industry in conformance with the requirements of Section 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(5). Each Fund is an employee pension benefit plan covered by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, commonly known as "ERISA", and has been required to pay annual premiums prescribed by the Pension Benefit Guaranty Corporation pursuant to Section 4006 of ERISA, 29 U.S.C. § 1306. Each has paid such premiums under protest.

The Northern California Funds are similar to the Operating Engineers Pension Trust which Petitioners administer in all respects material to this proceeding, and the circumstances which render the provisions of Title IV of ERISA unconstitutional as applied to Petitioners' Trust also apply to the Funds. Each Fund has filed an action

against the Pension Benefit Guaranty Corporation in the United States District Court for the Northern District of California raising the same issues as those raised by Petitioners in their action, and in each of the actions the Court has postponed a ruling on a motion of the Corporation to dismiss the complaint until after final resolution of the issues in Petitioners' action.[1]

One of the purposes of this brief is to bring to the attention of the Court facts and circumstances relating to the Northern California Funds which are typical of collective bargaining relationships and agreements in the building and construction industry in areas where management and labor have followed the collective bargaining procedures mandated by the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.*, and which emphasize the substantial nature of the constitutional issues presented in the *Connolly* action.

Title IV of ERISA purports to impose "substantial, new and in some cases retroactive liabilities" upon employers contributing to employee pension benefit plans (*Connolly v. Pension Benefit Guaranty Corporation* (9th C.A. 1978) 581 F.2d 729, 732). The imposition of such liabilities upon a single employer in an industry other than construction

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[1]The actions are numbered on the Records of the United States District Court for the Northern District of California as Civil Cases Nos. C-77-2409-SC, C-77-2846-SC, C-77-2588-SC and C-77-2589-SC. In each case the order, filed on September 21, 1979, concludes:

> "It appears that no harm will come to any party if the court postpones a ruling on PBGC's motion until after final resolution of the identical issues raised in the *Connolly* litigation. It is therefore ordered that PBGC's motion is denied without prejudice to renewal at a later date. The cases will be held open pending termination of the Connolly case."

has been justified on the ground that when employees have served the employer for the requisite number of years to qualify for pensions, the employer has "received the benefit he bargained for" (*Nachman Corp. v. Pension Benefit Guaranty Corp.* (7th C.A. 1979) 592 F.2d 947, 962, *cert. gr.* 99 S. Ct. 1278) and there is no inequity in requiring him "to make good on his pension promise" (592 F.2d at p. 956, note 20).

In the building and construction industry, however, an employer does not bargain for the services of a carpenter, a cement mason, a laborer or an operating engineer for a period sufficient to qualify for a pension. His primary concern is to secure the services of such a craftsman for long enough to complete the work he has for him, at a fixed hourly cost which can be charged to and recovered from the project on which the work is performed. Where part of the hourly cost is to go for pension benefits, he bargains specifically for a fixed contribution which is not accompanied by future liabilities, contingent or otherwise. The craftsmen, and the unions who represent them, understand the terms of this bargain, and acquiesce to and accept those terms.

Abrogation of the bargain imposes irreparable injury not only upon the employers who are threatened with the liabilities but also upon the pension plans, and their participants and beneficiaries, who lose the benefits of the bargain. The threat of the liabilities has an immediate impact upon the employers since the possibility that the liabilities may some day be imposed must be revealed in their financial statements and impair their ability to secure needed financing and the bonding capacity necessary to

obtain construction work. The threat and its consequences for the employers also have an immediate impact upon the pension plans, and their participants and beneficiaries, since they are a persuasive deterrent to the initiation or the continuance of the written contribution agreements of the employers without which the plans cannot legally exist.

There is no rational basis for the abrogation of the bargain made by the employers and the unions, acting on behalf of the employees whom the unions represent, and such abrogation constitutes a violation of the Due Process Clause of the United States Constitution, not only as to the employers directly affected but also as to the employees, the pension plans and others who are adversely affected. The Boards of Trustees of the Northern California Funds, in discharge of their fiduciary responsibility to protect the interests of the participants and beneficiaries of the plans they administer (see ERISA, Section 404(a)(1), 29 U.S.C. § 1104(a)(1)), file this brief as *amici curiae* to emphasize the substantial nature of the constitutional issues involved in the *Connolly* action and the importance of a prompt determination of such issues.

ARGUMENT

I

FACTS AND CIRCUMSTANCES RELATING TO THE NORTHERN CALIFORNIA FUNDS EMPHASIZE THE SUBSTANTIAL NATURE OF THE CONSTITUTIONAL ISSUES PRESENTED IN THE CONNOLLY ACTION

A. Preliminary Statement

The Northern California Funds were established and are presently maintained pursuant to master collective bargaining agreements covering the 46 Northern Counties of California. These master agreements were first negotiated by employer associations and unions in the building and construction industry in the 46 Counties area following the end of World War II in 1945, more than 30 years ago, and since that time have been periodically renegotiated and continuously maintained by those associations and unions, or their successors. The agreements in their present form are the culmination of bargains made in negotiations over the years that have created and now maintain extremely valuable contract and property rights of employers and their associations, the unions and the employees whom the unions represent.

The master agreements covering the Northern California area are typical of agreements between employers and unions in the building and construction industry in other areas where management and labor have followed the collective bargaining procedures required by the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.* Therefore, a consideration of the history of the

Northern California master agreements, the nature of the contract rights and property interests maintained and protected by the agreements and the impact of the employer liability provisions of ERISA upon the agreements and the Northern California Funds is pertinent to a determination of the substantial nature of the claim that the employer liability provisions of ERISA deprive employers, unions and employees in the building and construction industry of property without due process of law and constitute a taking of such property without just compensation in violation of the United States Constitution.

B. The History of the Master Agreements

The master agreements were conceived by the parties who negotiated them as a means of establishing, for fixed periods of time, uniform wages, hour and terms and conditions of employment for construction tradesmen throughout the 46 Counties area,[2] to the mutual advantage of the employers and the employees.

Construction contractors generally operate on either a competitive bidding or a cost-plus basis. Where competitive bidding is required, the contractor must estimate his costs with sufficient accuracy to be the low bidder and still perform the work for a profit. Where work is done on a cost-plus basis, the contractor must invoice accurately and completely for all costs prior to final payment for the project. The construction contractor must also have avail-

[2]The 46 Counties area comprises all of Northern California between the northerly boundaries of San Luis Obispo and Kern Counties and the westerly boundaries of Inyo and Mono Counties, and the Oregon border.

able a supply of skilled craftsmen ready for quick referral.[3] In addition he must operate wherever the work is to be found, and if the work lies outside of his usual territory, he must know that he may transfer his key men to the job without union restrictions and that the remainder of his crew can be employed upon the same terms and conditions as those available to local contractors.

The master agreements provided construction contractors and builders with assurance that they could estimate their labor costs accurately in advance, that they would have available a supply of skilled craftsmen ready for quick referral, that the wages and other terms and conditions of the employment of craftsmen would not be changed in the course of job performance except as provided in the agreements and that they could operate throughout the 46 Counties area with only such restrictions, if any, as were provided in the agreements. In return, the craftsmen received many benefits, including a higher level of wages than otherwise would have prevailed throughout the 46 Counties area, a preference for employment opportunities, uniform travel and subsistence payments, union security rights which could not otherwise have been provided and, as the agreements were periodically renegotiated, soundly-based health and welfare plans, pension plans, vacation and holiday plans and other fringe benefits.

During the early years of the master agreements, the unions' demands with regard to employee compensation,

[3]See S. Rep. No. 187 and H. R. Rep. No. 741, 86 Cong., 1st Sess., U.S. Code Cong. & Admin. News 1959, pp 2344-2345, 2442, cited in *NLRB v. Iron Workers* (1978) 434 U.S. 335, 98 S. Ct. 651, 659.

and the negotiations of the parties, related to the hourly rates being paid each week to the craftsmen as wages. It was the position of the employers that the wage rates being paid under the master agreements were substantially higher than the rates paid to employees in more stable employment and that these higher rates compensated construction craftsmen for the absence of employer-paid health and welfare, pension, vacation and other fringe benefits. The employers claimed that fringe benefit plans for construction industry craftsmen would be too difficult to administer and that many contractors and builders would either refuse or fail to make contributions to the plans, thus giving them an unfair advantage over the contributing employers.[4]

In 1952 the unions made the establishment of health and welfare plans a strike issue and after a work stoppage by the carpenters unions which lasted two months, the employers capitulated and all of the master agreements

[4]In recommending amendment of the Davis-Bacon Act, 40 U.S.C., § 276a, to provide for the inclusion of fringe benefits in prevailing wage determinations on Federal projects, the Senate Committee on Labor and Public Welfare said (S. Rep. No. 963, 88th Cong., 2d Sess., U.S. Code Cong. & Admin. News 1964, p. 2341):

> "There are many localities throughout the country in which the great majority of contractors provide fringe benefits in addition to the cash wages paid to their employees. As we have indicated, these fringe benefits clearly constitute a form of wages. Therefore, if they are not included in the prevailing wage determinations, only a part of the compensation for employment is reflected. Under such circumstances, the minority of employers operating in the locality who do not provide the prevailing fringe benefits now enjoy an **unfair advantage** in bidding on Federal and federally assisted construction projects. **By not providing for their employees the benefits that prevail in the locality these employers are now able to enter lower bids than the local employers who maintain adequate wage standards.**" (Emphasis added.)

were amended to provide for such plans. The details of each plan were negotiated by a joint management-labor committee set up under the master agreement and at the conclusion of the negotiations the trust agreement providing for the plan was executed by the parties to the master agreement. In the case of each plan the trust agreement expressly limited the liability of each contributing employer to the health and welfare fund, or with respect to the health and welfare plan, to the contributions required by the employer's collective bargaining agreement and to payments in the event of delinquency required by the trust agreement.

At the time the health and welfare plans were negotiated the employer representatives notified the unions that the continuance of the plans was dependent upon the success of the unions in securing written agreements by non-association employers to contribute to the health and welfare funds. In 1952 and in each succeeding year the number of non-association or "independent" contractors and builders employing craftsmen represented by the unions in the 46 Counties area greatly exceeded the number of contractors and builders who belonged to the associations signatory to the master agreements, and in most if not all of these years the amount contributed by the independents to the health and welfare fund or funds established for each craft ranged from 35 to 70% of the total amount contributed. Both management and labor were in agreement, therefore, that the continued adherence of the independents to the master agreements was essential if the health and welfare plans were to grow and to provide more complete protection to covered employees and their

dependents and if other fringe benefit plans were to be established under the master agreements.

In 1956 the carpenters unions in four San Francisco Bay Area Counties, as a part of the settlement of a strike, secured the agreement of the employer associations to the establishment of a pension plan under the carpenters master agreements. In 1957 the carpenters unions in the remaining 42 Counties, the cement masons unions and the operating engineers union secured similar agreements from the associations, and in 1962 the laborers unions secured agreement to such a plan. In each case, the demand for the pension plan came entirely from the unions and was granted by the employers only under threat of strike, or in the case of the Bay Area carpenters and the laborers, as a result of strike action.

As in the case of the health and welfare plans, the details of each pension plan were negotiated by a joint management-labor committee set up under the master agreement and at the conclusion of the negotiations the trust agreement providing for the plan was executed by the parties to the master agreement. Again, each trust agreement expressly limited the liability of the individual contributing employer to the pension fund, or with respect to the pension plan, to the contributions required by the employer's collective bargaining agreement and to payments in the event of delinquency required by the trust agreement. In addition, the pension plan as negotiated by the committees under the carpenters, cement masons and laborers agreements, and as adopted by the parties to those agreements, provided as follows:

"*Limitation of Liability.* This Pension Plan has been adopted on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the Plan on a permanent basis. However, it is recognized that the benefits provided by this Pension Plan can be paid only to the extent that the Plan has available adequate resources for those payments. No Individual Employer has any liability, directly or indirectly, to provide the benefits established by this Plan beyond the obligation of the Individual Employer to make contributions as stipulated in his Collective Bargaining Agreement. In the event that at any time the Pension Fund does not have sufficient assets to permit continued payments under this Pension Plan, nothing contained in this Pension Plan and the Trust Agreement shall be construed as obligating any Individual Employer to make benefit payments or contributions (other than the contributions for which the Individual Employer may be obligated by his Collective Bargaining Agreement) in order to provide for the benefits established by the Pension Plan. Likewise there shall be no liability upon the Board of Trustees, individually or collectively, or upon any Employer, Signatory Association, Individual Employer, Union, Local Union or District Council to provide the benefits established by this Plan if the Pension Fund does not have assets to make such benefit payments."

In reliance upon the limitation of liability provisions of the trust agreement and the pension plan, the employer representatives on each joint management-labor committee agreed to pension plan terms which were far more liberal from the standpoint of the participating employees than could have been justified in the absence of such provisions.

Each committee agreed to provide minimum pensions for employees who had retired within 5 years prior to the effective date of employer contributions to the plan and to grant past service credit for work performed by participants of the type covered by the master agreement during a period of 25 years or more before such effective date. Much of the work for which this past service credit was granted was performed for contractors or builders who had gone out of business or departed from the area and who would therefore never contribute one penny to the pension fund. Under no conceivable principle of agency responsibility could the employer representatives on the committee have agreed to the unfunded accrued liability resulting from these pension plan terms if they had known or even suspected that such liability could lead to the imposition upon contributing employers of monetary obligations in excess of those fixed in the master agreement and the trust agreement.

After each plan was established the Board of Trustees appointed as representatives of employers and employees to administer the plan continued to rely upon the limitation of liability provisions. As increases in the rate of employer contributions to the plan were negotiated the Board approved increases in the pension benefits payable to employees based upon the projected amortization of the accrued liability of the plan over periods of up to 40 years. In the case of each benefit increase, the amortization period approved was actuarially sound, but the period was longer than could have been justified from the standpoint of prudence had the risk of contingent employer liability existed (see *In the Matter of a Dis-*

pute Between Employer Trustees and Union Trustees of the Cement Masons Southern California Pension Fund, August 21, 1979, BNA Pension Reporter No. 261, p. D-7).

Vacation and holiday plans, and apprenticeship, training and affirmative action plans, followed the health and welfare and pension plans under the master agreements, and in the case of every plan the employers have insisted, and the unions have agreed, that the obligation of each employer contributing to the plan is expressly limited to the contributions required by his collective bargaining agreement and to additional payments in the event of delinquency. Historically this fundamental concept was accepted without dispute by the unions as the collective bargaining representatives of the covered employees because both parties to the collective bargaining process recognized that the money contributed to the fringe benefit funds was a part of the employee's "wage package" which, if it had not been contributed to the funds, would have been paid to the employees as a part of his weekly pay check (see *supra* p. 9, note 4). Thus, when the unions negotiated contributions to the pension plans, and periodic increases in such contributions, they were implementing decisions upon the part of the employees to have payment of the amounts contributed deferred until after their retirement, in order to secure the tax and other advantages to the employees of such deferment. The employers did not participate in this decision, nor did they influence the decision or benefit from it.

The foregoing conclusion is illustrated by the master agreements covering cement masons, laborers and operating engineers which were negotiated in 1974 and 1977.

Each agreement was for a three year period. Each provided for a specified increase in the hourly "wage package" payable under the agreement, effective at the beginning of the second and third years of the agreement, which was to be allocated to any or all of specified purposes. In the case of each agreement these purposes included hourly wage rates and pension contributions and each agreement provided that the union alone was to make the allocation.

The rate of the hourly employer contribution to each fringe benefit plan established under the master agreements, and the benefits provided to employees under the plan, have steadily increased until now the master agreements maintain and protect contract rights and property interests of covered employers, employer associations, employees and unions which are of great value and which are entitled to receive, and should receive, constitutional protection.

C. The Nature of the Contract Rights and Property Interests Maintained and Protected by the Master Agreements

The master agreements prescribe the terms and conditions of employment of covered employees for specified periods and thus provide the benefits to both employers and employees already noted (*supra,* pp. 7-8). Some estimate as to the value of these benefits could doubtless be provided by statistics showing the dollar volume of construction work in the 46 Counties area and the total annual earnings of craftsmen covered by the agreements. Statistics showing the coverage and magnitude of the

fringe benefit plans that could not exist without the master agreements, however, are sufficient to demonstrate the substantial nature of the contract rights and property interests maintained and protected by the agreements.

During the latest fiscal year for which figures are available:

The Carpenters Pension Plan had 4758 contributing employers, 32,251 participants and beneficiaries and assets of more than $300,000,000, received more than $70,000,000 in employer contributions and paid benefits totalling more than $47,000,000 to 12,066 pensioners and beneficiaries. The Carpenters Health and Welfare Plan received more than $62,000,000 in employer contributions and paid more than $44,000,000 in benefits to 57,128 active carpenters and their dependents and more than $5,500,000 in benefits to 11,773 retired carpenters and their dependents. The Carpenters Vacation and Holiday Plan received more than $38,000,000 in employer contributions and paid more than $31,700,000 in vacation and holiday benefits to 36,282 participants and their beneficiaries. The Carpenters Apprenticeship and Training Plan received more than $3,100,000 in employer contributions and expended more than $2,500,000 in apprenticeship and training expenses.

The Cement Masons Pension Plan had 1007 contributing employers, 3484 participants and beneficiaries and assets of more than $48,000,000, received more than $7,000,000 in employer contributions and paid benefits totalling more than $3,700,000 to 875 pensioners and beneficiaries. The Cement Masons Health and Welfare Plan received more than $6,400,000 in employer contributions and paid more than $4,900,000 in benefits to 3322 active

and retired cement masons and their dependents. The Cement Masons Vacation/Holiday Plan received more than $7,300,000 in employer contributions and paid more than $5,700,000 in vacation and holiday benefits to 4224 participants and their beneficiaries.

The Laborers Pension Plan had 3060 contributing employers, 20,108 participants and beneficiaries and assets of more than $168,000,000, received more than $39,000,000 in employer contributions and paid benefits totalling more than $30,000,000 to 6392 pensioners and beneficiaries. The Laborers Health and Welfare Plan received more than $29,000,000 in employer contributions and paid more than $19,000,000 in benefits to 20,508 active and retired laborers and their dependents. The Laborers Vacation/Holiday Plan received more than $21,000,000 in employer contributions and paid more than $20,500,000 in vacation and holiday benefits to 19,820 participants and their beneficiaries. The Laborers Training and Retraining Plan received more than $2,000,000 in employer contributions and expended more than $2,000,000 in training and retraining expenses.

The Operating Engineers Pension Plan, which covers Northern Nevada and the States of Hawaii and Utah as well as the Northern California area, had more than 3600 contributing employers, over 27,000 participants and beneficiaries and assets of more than $300,000,000, received more than $60,000,000 in employer contributions and paid benefits totalling more than $20,000,000 to 6325 pensioners and beneficiaries. The Operating Engineers Health and Welfare Plans in the 46 Counties area received more than $32,000,000 in employer contributions

and paid more than $29,000,000 in benefits to approximately 15,000 active operating engineers and their dependents. The Pensioned Operating Engineers Health and Welfare Plan received more than $8,000,000 in employer contributions and paid more than $6,000,000 in benefits to over 6000 retired operating engineers and their dependents. The Operating Engineers Vacation Plan in the 46 Counties area received more than $17,000,000 in employer contributions and paid an equal amount in vacation benefits to 20,000 participants and their beneficiaries. The Operating Engineers Affirmative Action Plan received more than $4,500,000 in employer contributions and expended more than $5,000,000 in apprenticeship, training, and affirmative action expenses.

Of the employers contributing to the Carpenters Pension Plan, 1947 or approximately 41% were independent contractors or builders, who contributed $28,877,308 or approximately 41% of the total employer contributions to the Plan. 788 or approximately 78% of the employers contributing to the Cement Masons Pension Plan were independents, who contributed more than $5,000,000 or approximately 71% of the total employer contributions to that Plan. 1950 or approximately 64% of the employers contributing to the Laborers Pension Plan were independents, who contributed more than $13,000,000 or approximately 35% of the total employer contributions to the Plan.

There were approximately 3200 employers contributing to the Operating Engineers Pension Plan with respect to work in the 46 Counties area. Of this total, 359 or approximately 11% were members of the Associated General Contractors of California, the association which

negotiated the 46 Counties master agreement with the Operating Engineers Union, 615 or approximately 19% were members of smaller associations which adhered to the master agreement through short form agreements or through more detailed agreements containing modifications dealing with problems unrelated to the pension plan that were peculiar to the association and the remaining 70% were independents. Since the Operating Engineers Pension Plan covers areas outside the 46 Northern California counties (see supra, p. 17), statistics showing the relative contributions of AGC members and non-AGC members to the Pension Plan with respect to work within the 46 Counties area are not readily available. The experience of the Health and Welfare Plans, which are confined to the 46 Counties area, indicate that the AGC members made 33⅓% of such contributions and non-AGC contractors made 67⅔% of the contributions.

The foregoing statistics demonstrate that any impairment of the contractual obligation of employers contributing to the pension plans which results in the refusal of a substantial number of independent contractors and builders to continue adherence to the master agreements will have a devastatingly adverse effect upon those plans and upon all other benefit plans maintained under the agreements.

D. The Impact of the Employer Liability Provisions of ERISA Upon the Master Agreements and the Funds Maintained and Protected by the Agreements

Both Section 302(c)(5) of the Labor-Management Relations Act, as amended, 29 U.S.C. § 186(c)(5), and Section

402(a)(1) of ERISA, 29 U.S.C. § 1102(a)(1), require that an employer's agreement to make contributions to a collectively-bargained employee benefit fund be in writing. Employers who are represented in collective bargaining by an association signatory to an agreement to make such contributions are bound by the association's signature. Employers who are not thus represented, however, must be bound to make such contributions in some other way. Otherwise, the making of the contributions is an illegal act, and the acceptance of the contributions might conceivably subject the administrators of the fund to personal liability (see *Walsh v. Schlecht* (1977) 429 U.S. 401, 97 S.Ct. 679, 684; *Moglia v. Geoghegan* (2d C.A. 1968) 403 F.2d 110, 116; *Aitken v. IP & GCU-Employer Retirement Fund* (9th C.A. 1979) 604 F.2d 1261, 1269).

Up to the present time the advantages to be gained by both employers and employees from the master agreements has preserved the integrity of those agreements through repeated reopenings and renegotiations. Even at times when relations between management and labor have been strained and the divisiveness of union strike action and employer resignations from the bargaining associations has temporarily prevailed, the parties have ultimately returned to the stability and order provided by the master agreements. And after each renegotiation the advantages to the independent contractors and builders of adherence to the master agreements have enabled the unions to negotiate memoranda or "short form" contracts to be bound by the master agreements and to contribute to the funds with the great majority of the independents employing carpenters,

cement masons, laborers and operating engineers in the 46 Counties area.

The employer liability provisions of ERISA pose a serious and immediate threat to the continued success of this negotiating process. After the enactment of ERISA the master agreements were first open for renegotiation in 1977. At that time the parties to the agreements were so concerned with the possible adverse effects of the employer liability provisions that they amended each agreement to provide that the pension plan established and maintained by the agreement "is and has been a defined contribution plan." The agreements will again be open for renegotiation in April, 1980, and the parties this time will be faced not only with the holding of the Court of Appeals in the *Connolly* case that such plans are defined benefit plans within the meaning of ERISA but also with the May 1, 1980 deadline for the effectiveness of the employer liability provisions as applied to multiemployer plans.

If the employer liability provisions can constitutionally apply to the pension plans maintained pursuant to the master agreements, those provisions will destroy one of the key considerations for the employers' agreement to contribute to the plans; namely, that such contributions will be fixed and certain. The provisions will create contingencies which will be impossible to estimate accurately, but which will inevitably appear in financial statements and impair the ability of the contractor or builder to secure needed financing and to maintain the bonding capacity so important to the contractor's business. The provisions will be especially damaging to the many contractors and builders who employ all four crafts covered by the

master agreements and who would thus have their entire net worth at risk.

For the reasons given in the next section of this brief, we submit that the employer liability provisions of ERISA cannot constitutionally be applied to multiemployer pension plans in the building and construction industry maintained pursuant to collective bargaining agreements like the master agreements. We urge at this point that it is critically important to pension plans such as the Northern California Plans that this constitutional issue be determined as soon as possible. Until it is decided that the liability provisions cannot constitutionally be applied to such plans, employer resistance to the continuance of the plans will harden, and while the plans may survive this resistance, the benefits they can provide will most certainly be curtailed by employer insistence upon more rapid funding.

A more immediate and more serious threat is employer defection from the master agreements. The employer association parties to the master agreements are voluntary organizations, and subject to limits prescribed by the association bylaws and rules applicable to multiemployer bargaining, individual contractor or builder members may terminate the bargaining authority of the association by resignation or other means and thus cease to be bound by the master agreements, including the provisions for contributions to the plans. While the contracts signed by independent contractors and builders normally bind them to the outcome of renegotiations of the master agreements, they may also escape from the agreements through proper notice procedures, and independents who have never signed

contracts with the unions can avoid obligation to the plans simply by withholding their signatures.

The effects of employer defection from the master agreements will not be limited to the pension plans. Such defection will affect all other fringe benefit plans maintained pursuant to the agreements, since an employer may not legally contribute to any of the plans unless he is a party to the agreements (see *supra,* p. 20). Therefore, continued uncertainty as to the constitutionality of applying the employer liability provisions to collectively-bargained multiemployer pension plans in the building and construction industry threatens irreparable injury not only to the pension plans and their participants but also to many other valuable interests of the participants.

II

THE EMPLOYER LIABILITY PROVISIONS OF ERISA CANNOT CONSTITUTIONALLY BE APPLIED TO COLLECTIVELY-BARGAINED MULTIEMPLOYER PENSION PLANS IN THE BUILDING AND CONSTRUCTION INDUSTRY

The case most directly in point on the constitutional issue raised by the complaint in the *Connolly* action is *Nachman Corp. v. Pension Benefit Guaranty Corp.* (7th C.A. 1979) 592 F. 2d 947, *cert. gr.*, 99 S.Ct. 1278 (1979), where the Court upheld the constitutionality of the employer liability provisions of ERISA as applied to a collectively-bargained pension plan maintained by a single employer for employees at one of its facilities. An analysis of the reasoning of the *Nachman* Court in reaching its conclusion of constitutionality demonstrates that a contrary conclusion is required when the employer liability provisions are applied to collectively-bargained multiemployer pension plans in the building and construction industry, such as the *Connolly* plan and the plans maintained by the Northern California Funds.

In *Nachman* the Court said (592 F.2d at p. 960):

> "Application of the factors relevant to judicial assessment of rationality, as distilled from these and other precedents, indicates that Title IV of ERISA satisfies Due Process. Rationality must be determined by a comparison of the problem to be remedied with the nature and scope of the burden imposed to remedy that problem. In evaluating the nature and scope of the burden, it is appropriate to consider **the reliance interests of the parties affected**, *Allied Structural Steel Co.*, 46 U.S.L.W. at 4890-91; *Adams Nursing Home of*

> *Williamstown, Inc. v. Mathews*, 548 F.2d 1077, 1080-81 (1st Cir. 1977); whether the impairment of the private interest is effected in **an area previously subjected to regulatory control**, *Allied Structural Steel Co.*, 46 U.S.L.W. at 4891, *Federal Housing Administration v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958); the **equities** of imposing the legislative burdens, *Alton Railroad*, 295 U.S. at 354; *Turner Elkhorn Mining*, 428 U.S. at 19, and the inclusion of statutory provisions **designed to limit and moderate the impact of the burdens.** *W.B. Worthen Co.*, 292 U.S. at 434; *Allied Structural Steel Co.*, 46 U.S.L.W. at 4891. It must be emphasized that although these factors might improperly be used to express merely judicial approval or disapproval of the balance struck by Congress, they must only be used to determine **whether the legislation represents a rational means to a legitimate end.** *See Turner Elkhorn Mining*, 428 U.S. at 18-19." (Emphasis added)

In the building and construction industry the reliance interests of employers contributing to collectively-bargained multiemployer pension plans far outweigh the corresponding interests of employees who are participants in such plans.

For the reasons we have given above, fixed and certain labor costs are a business necessity for the employers. The employees know and understand this necessity and they have never expected that this need of the employer would be sacrificed to provide them with pension benefits which the pension plans could not support. It was the employees who insisted, through their collective bargaining representatives, that money which otherwise would have been added

to their weekly pay checks be contributed to pension plans for their benefit. They have always known that a basic condition imposed by the employers upon such contributions was the limitation of the employers' pension liability to the amount of the contributions. They fully accepted that condition and in the case of the Northern California Funds they have reaffirmed that acceptance, notwithstanding enactment of the employer liability provisions of ERISA. In no sense, therefore, could a loss of pension benefits resulting from the termination of such a plan before it had become fully funded constitute "an abuse of the private pension system in need of correction" (592 F. 2d at p.961).

Insofar as the factor of prior regulatory control is concerned, the *Connolly* plan, like each of the Northern California plans, satisfied the federal income tax code in effect prior to the enactment of ERISA and the contributing employers had no reason to anticipate that the limitation of their liability to the amount of their contributions would be abrogated (see *Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 254, 98 S.Ct. 2716, 2723). They "relied heavily, and reasonably, on this legitimate contractual expectation" in agreeing to make and making contributions to the plans *(ibid.)*.

When the respective equities of the employers and employees are considered, the equities of the employers clearly predominate over those of the employees. Because of the contractual expectation of the employers that their liability was limited to the collectively-bargained contribution rate, the employees have enjoyed past service credits and pe-

riodic benefit increases which would not have been provided in the absence of such contractual limitation. The individual employer did not bargain for, nor in most cases did he receive, the service of the employees for the requisite period to provide vested benefits under the plan (*cf.* 592 F.2d at p. 962). It was the employees and not the employers who determined how much of each increase in the "wage package" should be allocated to pensions, at first through demands in the negotiations and later, as to certain of the increases, through unilateral allocation. And at no time have the employers promised the payment of pension benefits in excess of those supported by the negotiated employer contributions and the accumulated assets of the pensions plans (*cf.* 592 F.2d at p. 957, n. 20).

The provisions of ERISA "designed to limit and moderate the impact of the burdens" imposed by the employer liability provisions are meaningless insofar as pension plans in the building and construction industry are concerned. The damage to construction employers is done more by the possibility of contingent employer liability, which deprives them immediately of needed financing and bonding capacity, than by the actual imposition of such liability, which in the very nature of the liability is bound to be uncertain and fortuitous from the standpoint of the individual employer.

Further, the major impact of the burdens of employer liability is not on the individual employers but on the complex and unique collective bargaining relationships between employers and employees in the building and construction industry, which have established and successfully

maintained master agreements like those in the Southern and Northern California areas over a period of more than 30 years. The continued existence of the pension plans, as well as the other fringe benefit plans maintained under these agreements, is completely dependent upon the adherence to the agreements of the great majority of the employers in the industry. If a substantial number of these employers withdraws from the agreements, the remaining employers can no longer support the plans and the ultimate losers will be the plan participants and their beneficiaries, whom ERISA was intended to protect.

The unique character of the collective bargaining relationships between employers and employees in the building and construction industry has been acknowledged by Congress over a period of many years and has led to legislation designed to meet the special problems of those relationships. Notable instances of such legislation are the addition in 1959 of subsection (f) to Section 8 of the National Labor Relations Act, 29 U.S.C. § 158(f), authorizing pre-hire contracts in the industry, and the amendment of the Davis-Bacon Act in 1964 to provide for the inclusion of fringe benefits in prevailing wage determinations on Federal projects (Pub. L. 88-349, § 1, 78 Stat. 238). In each of these instances the employer liability provisions of ERISA exacerbate rather than ameliorate the burdens which the earlier legislation was intended to remove.

Subsection 8 (f) authorizing pre-hire agreements in the building and construction industry was added to the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, for the purpose of removing a cloud from master agreements,

such as those in effect in Northern and Southern California, which was created by the application of that Act to the industry after 1947. The purpose of the subsection was explained by the Senate Committee on Labor and Public Welfare as follows (S. Rep. No. 187, 86th Cong., 1st Sess., U.S. Code Cong. & Admin. News 1959, p. 2318, at pp. 2344-2345):

> The problems of the building and construction industry under the Taft-Hartley Act have been the subject of considerable comment by authorities in the field; and Congress in previous years has made several attempts to correct the shortcomings of the act as applied to the industry. The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon various stages of construction.
>
> During the Wagner Act period, the National Labor Relations Board declined to exercise jurisdiction over the industry not only because of these complexities but also because the industry was substantially organized and hence had no need for the protection afforded by the act. Concepts evoked by the Board therefore developed without reference to the construction industry. In 1947, after passage of the Taft-Hartley amendments, the Board applied the provisions of the act to the building and construction industry.
>
> That this application of the act to the construction industry has given rise to serious problems is attested by the following in which the difficulties of the industry are set forth in detail:
>
> * * * * *

The bill endeavors to resolve certain most urgent problems, leaving to the future other difficulties which require attention.

Characteristics of the industry and the bill

In the building and construction industry it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as 3 years. Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated. The practice of signing such agreements for future employment is not entirely consistent with Wagner Act rulings of the NLRB that exclusive bargaining contracts can lawfully be concluded only if the union makes its agreement after a representative number of employees have been hired. One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral. A substantial majority of the skilled employees in this industry constitute a pool of such help centered about their appropriate craft union. If the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees eventually hired.

Subsection 8(f) has been construed as permitting an employer to repudiate a pre-hire agreement with a union at any time before the union achieves majority support in the unit covered by the agreement (*National Labor*

Relations Board v. Ironworkers Union (1978) 434 U.S. 335, 98 S.Ct. 651, 658). Where an independent contractor or builder has signed a pre-hire memorandum or "short form" agreement to abide by the terms of a master agreement and to make contributions to the employee benefit plans maintained pursuant to the master agreement, the National Labor Relations Board has held that the employer may repudiate its agreement as to any of its projects on which the union lacks majority support (*Construction and General Laborers, No. 304, AFL-CIO and Paul E. Iacono Structural Engineer, Inc.* (1979) 245 NLRB No. 59, 1979-80 CCH NLRB ¶ 16,455, 102 BNA 1499). These conditions on the enforceability of such an agreement are difficult to surmount under the best of circumstances, and when the employer is provided by the employer liability provisions of ERISA with a special incentive to repudiate the agreement, the conditions will become insurmountable in an increasing number of cases. Thus, by eroding the financial support of independent contractors and builders which is so vital to the continuance of pension plans for craftsmen in the building and construction industry, the employer liability provisions of ERISA diminish rather than enhance the protection given to participants in the plans.

The 1964 amendment to the Davis-Bacon Act authorizing the inclusion of fringe benefits in prevailing wage determinations on Federal projects was enacted for the purpose of removing an unfair advantage which employers who did not provide fringe benefits to their employees enjoyed over employers who did provide such benefits (see *supra* p. 9, note 4). The solution adopted by Congress was to

require an employer who did not provide fringe benefits to pay the equivalent of the cost of such benefits directly to its employees in cash (40 U.S.C. § 276a (b)). Since the cost of the benefits is measured by the rate of contributions to fringe benefit plans providing the benefits plus the anticipated costs of any benefits not provided through a plan, and does not include any allowance for the contingent liability which ERISA imposes upon the contributing employers, the unfair advantage intended to be removed by the 1964 amendment to the Davis-Bacon Act is restored by the employer liability provisions of ERISA.

For the foregoing reasons the employer liability provisions of ERISA as applied to collectively-bargained multiemployer pension plans in the building and construction industry cannot pass the test of rationality formulated by this Court in its decisions and articulated and applied in a different context by the Court of Appeals in *Nachman.*

CONCLUSION

The issue presented by this proceeding is a narrow one; namely, whether or not the claims of unconstitutionality presented by the complaint in the *Connolly* case are substantial enough to require the convening of a three-judge court for their determination. We have argued the merits of certain of the claims in the belief that such argument, and the facts and circumstances presented in support of the argument, will demonstrate the substantial nature of the claims.

The urgency of an early hearing and determination of the claims cannot be over-emphasized. The master agreements in Northern California, like those in Southern California, will be open for renegotiation beginning in April, 1980. If the claims are heard at an early date by the Court authorized to decide them, the concerns of the employers with the liability provisions of ERISA will be eased, and the adverse effect of those concerns upon the continued existence of the pension plans will be ameliorated. We urge, therefore, that the petition herein be granted.

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